

De Facto Relationships under the *Family Law Act*: 12 Months On

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Introduction

The de facto changes were introduced by the *Family Law Amendment (De Facto Financial Matters And Other Measures) Act 2008* ("the 2008 Act") and came into effect on 1 March 2009.

Nearly 18 months later there is still very little direct case law on the amendments, although there are at least two cases that have particular, though indirect, relevance to this area. These cases are *Kennon v Spry*¹ and *Kostres and Kostres*² and will be dealt with in detail below.

The geographical issues flowing from the failure of all States to refer their powers have now been resolved to the degree that they are going to be in the foreseeable future, with South Australia having referred powers under the *Commonwealth Powers (De Facto Relationships) Act 2009*. Western Australia has not, but since the Western Australian *Family Court Act 1997* effectively includes most of the significant provisions of Part VIIIAB of the Commonwealth *Family Law Act 1975*, similar laws are now available to de facto couples across the country.

Nevertheless, the powers referred by the States are not all encompassing and there are necessarily differences in the nature of de facto and marriage relationships. It was not therefore possible for Parliament to fold the de facto provisions into the current *Family Law Act* to form a seamless whole. There are subtle differences particularly in the financial agreement provisions, and there is no s 85A equivalent. Particularly in the light of comments by Kiefel J in *Kennon v Spry*³, this may be turn out to be a highly significant omission.

It should be noted that the existence or not of a de facto relationship is significant in relation to the surrogacy provisions contained in s 60H, which makes the meaning of such relationships as set out in s 4AA a significant issue. However, the primary emphasis in this paper will be on financial matters.

The Referral of State Power

Without a relevant referral of powers pursuant to paragraph 51(xxxvii), the Federal Parliament lacks the power to include de facto property matters in the *Family Law Act*. Accordingly, the 2008 Act inserted a device for the participation of the States and the potential referral of their powers into the *Family Law Act*. This is contained in s 90RA, which reads as follows:

- (1) For the purposes of this Act, the following are the participating jurisdictions:
 - (a) each referring State;

¹ [2008] HCA 56.

² (2009) FLC ¶93-420.

³ [2008] HCA 56.

- (b) each Territory.
- (2) A State is a referring State if:
- (a) the Parliament of the State has referred, or refers, to the Parliament of the Commonwealth financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships; and
 - (b) the referral of the financial matters is made:
 - (i) for the purposes of paragraph 51(xxxvii) of the Constitution; and
 - (ii) to the extent that the financial matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution).

According to the definition in s 4(1) of the *Family Law Act*, "financial matters" means:

- (b) in relation to the parties to a de facto relationship--any or all of the following matters:
 - (i) the maintenance of one of the parties;
 - (ii) the distribution of the property of the parties or of either of them;
 - (iii) the distribution of any other financial resources of the parties or of either of them.

NSW had already referred its powers under the *Commonwealth Powers (De Facto Relationships) Act 2003* ('the Referring Act'). The relevant provision is s 4:

- (1) The following matters, to the extent to which they are not otherwise included in the legislative powers of the Parliament of the Commonwealth, are referred to the Parliament of the Commonwealth for a period commencing on the day on which this Act commences and ending on the day fixed, pursuant to section 5, as the day on which the references under this Act are to terminate, but no longer:
 - (a) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes,
 - (b) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.

The differences in the definitions contained in the *Family Law Act* and the Referring Act are highly suggestive. Following are some of the definitions contained in the Referring Act:

de facto partner means a person who lives or has lived in a de facto relationship.

de facto relationship means a marriage-like relationship (other than a legal marriage) between two persons.

financial matters, in relation to de facto partners, means any or all of the following matters:

- (a) the maintenance of de facto partners,
- (b) the distribution of the property of de facto partners,

- (c) the distribution of any other financial resources of de facto partners, including prospective superannuation entitlements or other valuable benefits of or relating to de facto partners.

property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and wherever situated, including money or choses in action.

The NSW definitions appear to be broader than those contained in the *Family Law Act*; they are certainly different. For example, compare the definition of 'property' in the *Family Law Act*:

"property" means:

...

- (b) in relation to the parties to a de facto relationship or either of them--means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

Choses in action are not specifically mentioned as they are in the Referring Act definition, though some, if not all, choses in action have certainly been found to be property under the *Family Law Act*⁴.

The question of whether the referred powers are broader or narrower arises because subsection 3 of s 90RA reads as follows:

- (3) To avoid doubt, a State is not a referring State if its Parliament has referred, or refers, to the Parliament of the Commonwealth only a limited class of the matters referred to in paragraph (2)(a).

Given the limitation of the reference of power (ie, to matters relating to de facto partners arising out of the breakdown, other than by reason of death, of de facto relationships), it has to be wondered if the cases will find an exact match between de facto financial causes and matrimonial causes in the application of principles of accrued and associated jurisdiction. In this regard, according to the Full Court in *Warby v Warby*⁵, the Family Court

is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms a part.⁶

Nevertheless, the Full Court also noted that a relevant consideration to the Court's decision to exercise its accrued jurisdiction is "whether the claims are non-severable from a matrimonial cause and arise out of a common sub-stratum of facts."⁷ The extent of the available accrued jurisdiction (which derives from ss 76(ii) and 77 of the Constitution) remains somewhat untested in the Family Court, although

⁴ Compare *Kennon v Spry* [2008] HCA 56 which found property subsisted in, for example, a beneficial object's right to due consideration as a beneficiary by the trustee of a beneficial trust, and *In the marriage of Zorbas and Zorbas* (1990) FLC ¶92-160 which found that a bare right to sue (certainly a type of chose in action) was not property.

⁵ [2001] FamCA 469.

⁶ [2001] FamCA 469 at para 79.

⁷ *Ibid*, para 95.

given the decision of the High Court in *Re Wakim*⁸ (which rendered the cross-vesting scheme unconstitutional), accrued jurisdiction presents an important source of additional jurisdiction to the FCA.

It may well be argued that a de facto 'matter' has different boundaries to those relating to a matrimonial cause, with the result that this additional source of jurisdiction may have different effects across Parts VIII, VIIIA and VIIIAB.

What Constitutes a De Facto Relationship?

The 2008 Act inserted a new s4AA which provides the following guidance on this central question:

- (1) A person is in a ***de facto relationship*** with another person if:
- (a) the persons are not legally married to each other; and
 - (b) the persons are not related by family (see subsection (6)); and
 - (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

So what are the relevant circumstances referred to in subsection 1(a)? Subsection 2 is headed '*Working out if persons have a relationship as a couple*', and, absent a reference to 'the procreation of children', the matters listed are largely drawn from the one provided by Justice Powell in *Roy v Sturgeon* [1986] 11 Fam LR 271 at 274:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship⁹;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

⁸ (1999) 198 CLR 511.

⁹ Registration of relationships is currently available in Tasmania, the ACT and Victoria.

- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.
- (4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.
- (5) For the purposes of this Act:
 - (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
 - (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

Subsection 1(b) has the effect that two people are not in a de facto relationship if they are 'related by family'. Subsection 6 specifies that two people are 'related by family' if:

- (a) one is the child (including an adopted child) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
- (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

It is important to note that the various referring laws excluded a breakdown of relationship by reason of death, and this is reflected in the definition of 'breakdown' as it applies to de facto relationships in s 4(1):

"breakdown" :

...

- (b) in relation to a de facto relationship, does not include a breakdown of the relationship by reason of death.

Note that a similar provision applies to marriages via sub-paragraph (a).

Nevertheless, under s 90SM(8):

[i]f a party to the de facto relationship dies after the breakdown of the de facto relationship, but before property settlement proceedings are completed:

- (a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings

Prerequisites for an Application Under the De Facto Provisions of the Family Law Act

Length of Relationship

Section 90SB contains the following gateway provision:

A court may make an order under section 90SE [power of court in maintenance proceedings], 90SG [urgent maintenance cases] or 90SM [alteration of property interests], or a declaration under section 90SL [declaration of interests in property], in relation to a de facto relationship only if the court is satisfied:

- (a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or
- (b) that there is a child of the de facto relationship; or
- (c) that:
 - (i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and
 - (ii) a failure to make the order or declaration would result in serious injustice to the applicant; or
- (d) that the relationship is or was registered under a prescribed law of a State or Territory.

Note that s 90SB does not apply to the parties' ability to enter into a valid binding financial agreement under Part VIIIAB.

Note also that the time constraint in s 90SB does not form part of the definition of 'de facto relationship' in s 4AA(1). Accordingly, one may be in a de facto relationship for some purposes (for example, entering into a binding financial agreement under s 90UC) but not for others (eg having orders made under s 90SM).

Timing of Breakdown

Part 2 of Schedule 1 of the 2008 Act contains the transitional provisions. Item 86(1) of Division 2 specifies that:

[s]ubject to item 86A, Parts VIIIAB and VIIIB, and subsection 114(2A), of the new Act do not apply in relation to a de facto relationship that broke down before commencement.

Item 86A in its turn deals with opting in, and will be dealt with below.

Geographical Requirements

S 90SK covers the geographical requirement for property applications. Note that s90SD mirrors this provision in relation to maintenance. S 90SK reads as follows:

- (1) A court may make a declaration under section 90SL, or an order under section 90SM, in relation to a de facto relationship only if the court is satisfied:
- (a) that either or both of parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the **application time**); and
 - (b) that either:
 - (i) both parties to the de facto relationship were ordinarily resident during at least a third of the de facto relationship; or
 - (ii) the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in paragraph 90SM(4)(a), (b) or (c);
 in one or more States or Territories that are participating jurisdictions at the application time; or that the alternative condition in subsection (1A) is met.
- (1A) The alternative condition is that the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down.
- (2) For the purposes of paragraph (1)(b), a State need not have been a participating jurisdiction during the de facto relationship.

Note that originally, Western Australia and South Australia were not participating jurisdictions. Under the South Australian *Commonwealth Powers (De Facto Relationships) Act 2009*, South Australia referred its powers, and so only Western Australia remains outside the scheme.

The Effect of Marriage

According to s 90SC(1), Division 2 of Part VIIIAB (other than subsections 90SJ(2) to (5) relating to maintenance orders) ceases to apply in relation to a de facto relationship if the parties to the de facto relationship later marry each other.

Nevertheless, s90SC(2) provides as follows:

- (2) Despite subsection (1), a declaration, order or injunction:
 - (a) made in property settlement proceedings under this Division in relation to the de facto relationship; and
 - (b) in force when the parties marry each other;
 may, after the marriage, be enforced, varied or set aside in accordance with this Act.
- (3) If a declaration, order or injunction is set aside as described in subsection (2), another declaration, order or injunction may be made under this Division in substitution for that declaration, order or injunction.

Further, in relation to binding financial agreements, note that s 90UJ(3) provides that a Part VIIIAB

financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other.

Opting In

As indicated above, Part 2 of Schedule 1 of the 2008 Act contains the transitional provisions, and item 86A of Division 2 sets out the mechanisms for opting in to the new regime. The relevant provisions are worded as follows:

- (1) The parties to a de facto relationship that broke down before commencement may choose for Parts VIIIAB and VIIIIB, and subsection 114(2A), of the new Act to apply in relation to the de facto relationship.

Under subitem 2, a choice opting in to the new system can be made if

- (a) the choice is unconditional; and
- (b) subitems (3), (4) and (5) are satisfied for the choice.

This subitem also specifies that a choice to opt in is irrevocable. Subitems 3 -5 referred to in subitem 2(b) above read as follows:

- (3) This subitem is satisfied for the choice if no order (other than an interim order) under a preserved law of a State or Territory has been made by a court in relation to either of the following:

- (a) how all or any of the:
 - (i) property; or
 - (ii) financial resources;

that either or both of the parties to the de facto relationship had or acquired during the de facto relationship is to be distributed;

- (b) the maintenance of either of the parties to the de facto relationship.

- (4) This subitem is satisfied for the choice if:

- (a) the parties have not made a designated State/Territory financial agreement in relation to their de facto relationship; or
- (b) if the parties have made such an agreement, that agreement has ceased to have effect without:
 - (i) any property being distributed; or
 - (ii) any maintenance being paid;

under the agreement.

- (5) This subitem is satisfied for the choice if:

- (a) the choice is in writing and signed by both of the parties to the de facto relationship; and

- (b) each of the parties was provided, before the choice was signed by him or her, with:
 - (i) independent legal advice from a legal practitioner about the advantages and disadvantages, at the time that the advice was provided, to the party of making the choice; and
 - (ii) a signed statement by the legal practitioner stating that this advice was given to the party.
- (6) For the purposes of Part VIIIAB of the new Act, a choice can be included in a Part VIIIAB financial agreement for which the parties are the spouse parties.

Providing a certificate under subitem 5 is not something to be undertaken lightly. Given the very different outcomes that could be expected under the *NSW Property (Relationships) Act 1984* and the *Family Law Act*, the cases where neither party's solicitor could provide such a certificate without considerable professional liability risks being incurred must be vanishingly small.

Under some circumstances the Court may set aside a choice. These are covered in subitems 7 to 9 of Part 2 of Schedule 1 of the 2008 Act:

- (7) A court may make an order setting aside a choice if the court is satisfied that, having regard to the circumstances in which the choice was made, it would be unjust and inequitable if the court does not set the choice aside.
- (8) A court setting aside a choice under subitem (7) may make such order or orders (including an order for the transfer of property) as it considers just and equitable to, so far as is practicable, return the rights of:
 - (a) the parties to the de facto relationship; and
 - (b) any other interested persons affected by the choice;
 to their position immediately before the choice was made.
- (9) Subsections 90UM(8) and (9) of the new Act apply in relation to setting aside a choice as if:
 - (a) a reference in those subsections to subsection 90UM(1) or (6) of the new Act were a reference to subitem (7) or (8); and
 - (b) the reference in those subsections to section 90UM of the new Act were a reference to this item.

Property Settlement and Maintenance

Following is a table setting out the parallel provisions of the *Family Law Act* dealing respectively with married couples and de facto couples, based on a similar table produced by His Honour Justice Garry Watts writing extra-judicially in 2008¹⁰.

¹⁰ *De Facto Property under the Family Law Act*, December 2008.

Table 1: De Facto Mirror Provisions in the FLA

Subject matter	Matrimonial Cause	De Facto Financial Cause
Binding Financial Agreements exclude the jurisdiction	s71A	s90SA(1)
Spousal Maintenance	s74	s90SE
Matters to take into account in maintenance proceedings	s75(2)	s90SF(3)
Urgent maintenance	s77	s90SG
Declarations of interests in property	s78	s90SL
Alteration of property interests	s79	s90SM
Just & Equitable	s79(2)	s90SM(3)
Matters to take into account	s79(4)	s90SM(4)
Varying and setting aside orders altering property	s79A	s90SN
General Powers	s80	s90SS(1)
Duty to end financial relationships	s81	s90ST
Modification of maintenance orders	s83	s90SI
Stamp Duty	s90	s90WA
Binding Financial Agreements (BFAs)	Pt VIIIA	Div 4 Pt VIIIAB
BFAs before marriage/cohabitation	s90B	s90UB
BFAs during marriage/cohabitation	s90C	s90UC
BFAs after divorce/breakdown	s90D	s90UD
Formal requirements of BFAs	s90G(1)	s90UJ(1)
Setting aside BFAs	s90K	s90UM
Validity, enforceability and effect of BFAs	s90KA	s90UN
Orders and injunctions binding third parties	Pt VIIIAA	Div 3 Pt VIIIAB

Apart from the geographical and time limit issues referred to above, for most purposes the property

and maintenance provisions substantially mirror each other. There are significant differences in at least two respects, however. The first is in the absence of a s85A equivalent and in the binding financial agreement provisions, both of which are dealt with below.

The Absence of a S 85A Equivalent

Until very recently s 85A (dealing with ante-nuptial or post-nuptial settlements) has received little attention from family lawyers. The section reads as follows:

- (1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
- (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
- (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.

There is no de facto equivalent to s 85A in Part VIIIAB, presumably because s 85A itself has received so little use over the years and so has perhaps come to be seen by many as a redundant provision.

Given its history of neglect, what was the thinking behind the original insertion of s 85A in the *Family Law Act* in 1983? At paragraph 209 of *Kennon v Spry*¹¹, Kiefel J noted:

It is not difficult to infer that s 85A was directed to the use of discretionary family trusts and other structures used for holding assets acquired in the course of a marriage, for tax-related and other purposes. Vehicles such as these had been in common use for some time prior to 1983. It is apparent that s 85A was intended to give the Court power to deal with property which could not be the subject of an order under s 79, but which accorded with current conceptions of what was a "settlement" of property in matrimonial law.

Be that as it may, litigants and the Family Court have largely had resort to s 79 in order to deal with the assets of parties, notwithstanding the inherent limitations of the definition of 'property' in s 4. Certainly the majority in *Kennon v Spry* did not feel the need to venture far beyond s 79 in opening up the Court's capacity to unpack discretionary trust arrangements. Nevertheless, the majority decision still relied on the threading together of a number of related items of property to bring the assets of the relevant family trust into the matrimonial property pool. The majority found that the wife had an equitable right to due consideration as a potential beneficiary, although this of course did not amount to a vested interest in the trust property. She was also found to have a chose in action for the due administration of the trust, which was, however, similarly worthless without its link to a trustee subject to the jurisdiction of the Court who had real legal power to effect a distribution in her favour, which is

¹¹ [2008] HCA 56.

what the majority found the husband had. It was irrelevant that the husband could not benefit under the Deed; what was important was that his “power to apply assets or income of the Trust to Mrs Spry...was able to be treated...as a species of property¹²”. Thus there were several articulated links between the wife and the valuable assets of the trust: there was her equitable chose in action for due administration of the trust; there was a trustee who was a party to the marriage; there was the trustee’s fiduciary duty to the objects to give due consideration to the question of whether and in what way to benefit them; and there was the actual power in that trustee potentially to make a distribution of the entirety of the trust property in the wife’s favour (itself another species of property) regardless of the fact that she was not a beneficiary but merely one of a class of objects of the trust. It was the sum of these articulated proprietary links that attracted s.79¹³.

Kiefel J took a very different approach in relying on s 85A to arrive at a similar result. Because her logic does not require the trust to be effectively controlled by one of the parties, her reasoning is potentially much more far reaching than the majority’s in opening up the Court’s power to adjust interests in family trusts, so it is worth attempting to follow her logic.

At 225 Her Honour notes that:

"Settlement" is to be given a broad meaning consonant with the intention of s 85A to bring discretionary family trusts within the ambit of the Act. "Property" is to be read as including those assets to which the parties have contributed throughout the course of their marriage and which are held for their use and benefit. The Trust assets constitute property, much of which was obtained by way of the parties' contributions to the marriage. The assets therefore attract the operation of s 85A. Further, as shall become clear, on each occasion that property was transferred to the Trust, the parties "dealt with" their property, and effected settlements within the meaning of s 85A. The Trust property represents contributions of the parties and is held on terms of a settlement. It is "property dealt with by ... settlements".

She continues at 229:

There appears to be no reason why each disposition of property to the Trust, from the time of the parties' marriage, cannot be viewed as a separate trust created at that time, albeit on the terms of the Trust. It has been said that it is sufficient for the establishment of a trust that property is impressed with a trust obligation. In any event the conception of a settlement in s 85A is substantially informed by statutory context and purposes.

Finally, at 231 Kiefel J notes that:

[t]he trustees also placed reliance upon the description of the beneficiaries of the Trust, which extended beyond the husband and wife and the children of the marriage. By this means it was sought to deny the necessary nuptial element of the Trust. The husband's sisters and their issue also fell within the class of beneficiaries. The question of the impact of any order under s 85A upon those persons may be put to one side for present purposes. So far as concerns the character of the Trust, their inclusion does not deny the

¹² [2008] HCA 56 at paragraph 79 per French CJ.

¹³ [2008] HCA 56 at paragraph 137, per Gummow and Hayne JJ

nuptial element. Regard must be had to the circumstances pertaining to the Trust, for the purposes of s 85A. The nuptial element can readily be seen by the contribution made by the parties to the marriage to the Trust and the holding of that property for their benefit. The fact that the other beneficiaries may have received some, undisclosed, distribution from the Trust at some point does not detract from its essential character.

If correct, the net effect of Kiefel J's judgment would be to significantly increase the Court's reach into discretionary family trusts. As indicated above, under Her Honour's reasoning, there would be no need to find a trustee who was a party to the marriage, or even, perhaps, a discretionary family trust established by one of the parties if resort is had to s 85A. It might perhaps be sufficient to attract s 85A under Her Honour's approach if there is a discretionary trust set up by one of the parties' parents to which one of the parties contributed, either directly or indirectly. Being employed by a family business tied to the family trust may well be enough to establish an indirect disposition to the trust, and therefore a 'settlement' for the purposes of s 85A.

In a recent journal article Tim North SC wrote that

the possibility that we are witnessing the awakening of s 85A after 25 years of hibernation is ... a prospect that ought excite the interest of all who practice in this jurisdiction. At the least, no one can afford to ignore its possible reach.¹⁴

However, given that there is no s85A equivalent in Part VIIIAB, at this stage this reach will not extend into de facto property causes. This may lead to very different results in de facto and marital matters where family trusts are involved.

Binding Financial Agreements for De Facto Couples

The provisions relating to de facto binding financial agreements are as follows:

BFAs exclude the jurisdiction:	s90SA(1)
BFAs:	Div 4 Pt VIIIAB
Financial agreements before cohabitation:	s90UB
Financial agreements during cohabitation:	s90UC
Financial agreements after breakdown:	s90UD
Formal requirements of BFAs:	s90UJ(1)

¹⁴ Tim North SC, 'Spry v Kennon: The Last Word', (2010) 21(1) *Australian Family Lawyer* 15 at 25.

Setting aside BFAs:	s90UM
Validity, enforceability and effect of BFAs:	s90UN

Not including termination agreements under s90UL(1)(b), the Part VIIIAB agreements are as follows (including subsequent agreements terminating such agreements under s90UL(1)(a)):

1. s90UB: financial agreement **before** de facto relationship;
2. s90UC financial agreement **during** de facto relationship; and
3. s90UD financial agreement **after breakdown** of a de facto relationship.

All of the above agreements (including subsequent agreements terminating such agreements under s90UL(1)(a)) have as their subject matter certain 'specified matters', one or more of which must be included for the agreement to constitute a 'financial agreement'.

S 90UB(2) casts the 'specified matters' in the following terms:

- (a) how all or any of the:
 - (i) property; or
 - (ii) financial resources;

of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the de facto relationship, is to be distributed;
- (b) the maintenance of either of the spouse parties.

Sections 90UC(2) and 90UD(2) adapt this wording to their different contexts.

While a financial agreement must contain at least one of the relevant 'specified matters', each of the Part VIIIA agreements (covering married parties) may also include 'matters incidental or ancillary' to the ss90B-D(2) matters, as well as 'other matters' (ss90B-D(3)). Part VIIIAB agreements may also include 'matters incidental or ancillary' to the ss90UB-UD(2) matters, but, significantly, do not provide for 'other matters'. This is an artefact of the limitation of the referral of power from the States, which was confined to financial matters arising out of the breakdown of a relationship (other than by reason of death).

Given the above, it is clear that spousal maintenance is covered by Part VIIIAB agreements, and by virtue of section 90UH child maintenance issues could be included (this is in fact specifically contemplated by the note to s90UH(1)).

Special care now needs to be taken, however, if it is intended to make the agreement double up as a binding child support agreement under s80D of the *Child Support (Assessment) Act 1989* ('the Assessment Act'). This is because under s80D(2)(c) of the Assessment Act a binding child support

agreement must contain a statement in substantially the same format as the statement that was required to be attached to BFAs prior to the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act 2009*. Since the requirements for BFAs have now been overhauled (see below) and are therefore out of step with the formal requirements for binding child support agreements, there is a risk that attempting to incorporate both types of agreement in the one document could give rise to uncertainty. Given the Full Court's approach in *Kostres and Kostres*¹⁵ (see the case note at the end of this paper), any uncertainty in a BFA is plainly to be avoided.

The inclusion of superannuation is not a problem for a Part VIIIAB agreement so long as it is not the only subject matter of the agreement. There may be an issue however if the only subject matter of the agreement is superannuation. This is because superannuation has not traditionally been regarded as property for the purposes of s4 of the FLA. While the 'specified matters' applying to financial agreements include property *or* financial resources, the Full Court in *Coghlán and Coghlán*¹⁶ identified superannuation as 'another species of asset,' rather than as a financial resource, which may or may not cause some problem here.¹⁷

While other matters (such as an unenforceable parenting plan, for example) could certainly be included in a Part VIIIA agreement, this is not the case with a Part VIIIAB agreement, which, for the reasons alluded to above, should be limited to the ss90UB-UD(2) financial matters, and matters incidental or ancillary thereto.

Setting Aside BFAs

Sections 90UM and 90UN of the FLA refer to a number of circumstances that must be carefully considered at an early stage in advising clients in relation both to financial agreements and to agreements terminating financial agreements.

Firstly, it is important that practitioners drafting these agreements have a solid understanding of the law of contracts, since under s 90UN this is the starting point for the validity, enforceability and effectiveness of financial agreements under the FLA.

S 90UM sets out a number of circumstances which will trigger the Court's power to set aside a financial agreement. These include (but are not limited to) the Court being satisfied that:

1. the agreement was obtained by fraud;
2. the agreement was entered into by a party for purposes that included defrauding a creditor of the party or with reckless disregard for the interests of creditors (the *Rich & Rich*¹⁸ amendment);

¹⁵ (2009) FLC ¶93-420.

¹⁶ (2005) FamCA 429.

¹⁷ For further detail on this issue see Mark MacDiarmid, 'What Species of Asset? Binding Financial Agreements that Deal Only With Superannuation' 47(11) *Law Society Journal* (2009) 71.

¹⁸ Introduced in response to the decision in *ASIC v Rich & Rich* (2003) FamCA 114.

3. the agreement was entered into by a party for purposes that included defeating the interests of a de facto partner of a spouse party, or with reckless disregard for the interests of that person;
4. the agreement is void, voidable or unenforceable;
5. since the making of the agreement circumstances have arisen that make it impracticable for the agreement or a part of the agreement to be carried out;
6. since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the Court does not set the agreement aside;
7. in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable.

The Formal Aspects of the Agreement

The FLA treats the defining characteristics of ‘financial agreements’ separately from the steps necessary to render those financial agreements ‘binding’.

The part VIIIAB approach to the definition of ‘financial agreement’ can be seen from s90UB(1) (whose wording is adjusted across sections 90UC(1) and 90UD(1)):

- (1) If:
- (a) people who are contemplating entering into a de facto relationship with each other make a written agreement with respect to any of the matters mentioned in subsection (2) in the event of the breakdown of the de facto relationship; and
 - (b) at the time of the making of the agreement, the people are not the spouse parties to any other Part VIIIAB financial agreement that is binding on them with respect to any of those matters; and
 - (c) the agreement is expressed to be made under this section;
- the agreement is a Part VIIIAB financial agreement. The people may make the Part VIIIAB financial agreement with one or more other people.

In summary, the requirements for an agreement to be a ‘financial agreement’ are that:

1. the agreement is in writing;
2. the parties to the relationship are not spouse parties to other Part VIIIAB financial agreements; and
3. the agreement is expressed to be made under the relevant section.

Note also that under s 90UF(1), **separation declarations** must be made in order to give force to any provision of a BFA

to the extent to which it deals with how, in the event of the breakdown of the de facto relationship, all or any of the property or financial resources of either or both of the spouse parties:

- (a) at the time when the agreement is made; or
- (b) at a later time and during the de facto relationship;

are to be dealt with,

unless either or both parties die (s 90UF(2)). The note to s 90UF(2) reads as follows:

[t]his means the financial agreement will be of force and effect in relation to the matters mentioned in subsection (1) from the time of the death(s).

In a recent paper, Paul Doolan¹⁹ points out that changes made to s90DA (the marital equivalent of s 90UF) by the *Family Law Amendment (De Facto Financial Matters and other Measures) Act 2008*, mean that that section does not, unlike its predecessor, refer to provisions relating to the maintenance of either of the spouse parties after the termination of the marriage by divorce having no force or effect until a separation declaration is made. Similarly, s90UF does not refer to maintenance. This appears to leave some uncertainty as to when maintenance provisions take effect, although Doolan's suggested reading of the Act is that they probably take effect when the Agreement is signed by both parties.

In the same paper, Doolan notes that s 90SJ(1) provides that an order

with respect to the maintenance of a party to a de facto relationship in accordance with this Division ceases to have effect upon:

- (a) the death of the party; or
- (b) the death of the person liable to make payments under the order.

S 82(1) has substantially the same effect in relation to maintenance orders by the Court in the matrimonial causes realm (as opposed to arrangements effected by a BFA).

However, Doolan notes that according to s 90H (the marital equivalent of s 90UK):

[a] financial agreement that is binding on the parties to the agreement continues to operate despite the death of a party to the agreement and operates in favour of, and is binding on, the legal personal representative of that party.

S 90UK contains the following additional note:

If the parties are still in the de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the financial agreement (see the definition of breakdown in subsection 4(1)).

Because of the consequent risk that a maintenance obligation contained in a BFA will survive the death of the payer, Doolan recommends inserting a clause specifically terminating the obligation to pay

¹⁹ 'Financial Agreements: Everything You Always Wanted to Know, But Were Too Afraid to Ask', paper delivered at the Family Law Section of the Law Council of Australia's 14th Annual Family Law Intensive in Melbourne, 1 May 2010.

maintenance in the event of the death of either party, re-marriage of the payee, the payee entering into a de facto relationship for more than 3 months or the payer becoming insolvent, or after the passage of a nominated sunset date²⁰.

Making financial agreements binding prior to 4 January 2010

From 2004 up to the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act 2009* on 4 January 2010 ('the Amending Act'), sections 90G(1), 90J(1) (Part VIIIA agreements) and 90UJ(1) and 90UL(1) (Part VIIIAB agreements) all contained wording substantially in the following terms (the following is taken from the then in force s90UJ(1)):

- (1) A Part VIIIAB financial agreement (other than an agreement covered by section 90UE) is binding on the parties to the agreement if, and only if:
 - (a) the agreement is signed by both parties; and
 - (b) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
 - (i) the effect of the agreement on the rights of that party;
 - (ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and
 - (c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and
 - (d) the agreement has not been terminated and has not been set aside by a court; and
 - (e) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other.

A succession of cases²¹ took varied approaches to the rigour with which this form of wording was expected by the Court to be applied, culminating in *Black & Black*²² in 2008.

In setting aside a BFA, the Full Court (Faulks DCJ, Kay and Penny JJ) in *Black & Black* applied the requirements of s90G(1) literally and strictly, echoing the emphasis Collier J in *J & J*²³ had placed on the words 'if, and only if' that appear at the beginning of the section.

Paragraphs 43 – 45 of the *Black & Black* judgement provide a succinct summary of the relevant facts and reasoning:

²⁰ Ibid at 22.

²¹ Notably *J & J* (2006) FamCA 442; *Millington & Millington* (2007) FamCA 687; and *Ruzic & Ruzic* (2007) FamCA 473.

²² (2008) FLC ¶93-357.

²³ (2006) FamCA 442.

43. Subsection 90G(1)(b) (as it was prior to the 2004 amendments) expressly required that the agreement must contain a statement from each party that, before they executed the agreement, they received independent legal advice from a legal practitioner in relation to the matters referred to in (i) to (iv). The section went on to provide that the agreement must also annexe a certificate executed by that legal practitioner stating that the advice in relation to the matters referred in (i) to (iv) was provided to that party.
44. ***The agreement entered into by the parties in this case did not refer to the specific requirements detailed in s 90G, although the certificate did.*** [emphasis added]
45. Recital R and clause 29 of the agreement, set out at paragraphs 23 and 24 above, dealt predominantly with advice in relation to the legal implications of the agreement and each party's rights and obligations. These statements did not meet all the requirements set out in subsection 90G(1)(b), particularly there was no reference to advice in relation to whether the agreement was fair or prudent. In our view, such an omission meant that the agreement did not comply with the provisions of s 90G and was not binding upon the parties. It follows that we prefer the approach taken by Collier J in *J and J* (above) to that taken by the trial judge in this case. ***We are of the view that strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders under s 79.*** [emphasis added]

Federal Justice System Amendment (Efficiency Measures) Act 2009

In response to the *Black and Black* decision, as of 4 January 2010, sections 90G, 90J, 90UJ and 90UL now contain wording substantially in the following terms (taken from the current s90UJ):

- (1) Subject to subsection (1A), a Part VIIIAB financial agreement (other than an agreement covered by section 90UE) is binding on the parties to the agreement if, and only if:
- (a) the agreement is signed by all parties; and
 - (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
 - (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
 - (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
 - (d) the agreement has not been terminated and has not been set aside by a court.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

- (1A) A financial agreement is binding on the parties to the agreement if:
- (a) the agreement is signed by all parties; and
 - (b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and
 - (c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and
 - (d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and
 - (e) the agreement has not been terminated and has not been set aside by a court.
- (1B) For the purposes of paragraph (1A)(d), a court may make an order declaring that a Part VIIIAB financial agreement is binding on the parties to the agreement, upon application (*the enforcement application*) by a spouse party seeking to enforce the agreement.
- (1C) To avoid doubt, section 90UN applies in relation to the enforcement application.

In addition, the new provisions operate retrospectively to validate financial agreements and termination agreements made on or after 27 December 2000 and before the commencement of the new provisions. Significantly, under item 17(5) of Schedule 5 of the Amending Act, the certifying requirements of s90UJ(1)(c) and (ca) do not apply to pre-4 January 2010 agreements, so the format of certificates attached to those agreements is no longer an issue. Nevertheless, the agreement in question must not have been set aside by a Court, so agreements that have been rejected by the courts over the last few years cannot be resuscitated.

After *Black and Black*, but prior to the above amendments, practitioners could draw some comfort from the fact that although the formal requirements were applied strictly, those requirements could be expressed with some certainty, and compliance could be determined from an examination of the document itself. One effect of these changes is that we can now no longer rely on the face of the document to ascertain formality: whether or not the advice required to be given under s 90UJ(1)(b) has in fact been given cannot be ascertained from the agreement if there is no solicitor statement attached. Even if such a statement is attached, it may be difficult to ascertain whether the advice purportedly given was accurate, or, for that matter, even given at all. Recall that under the old s 90UJ(1) the obligation was simply to include a statement that certain advice had been given and to attach a certificate from the person giving the advice stating that the advice had been given; now, independently of what is said in the agreement or in any statement given to the other party there is an obligation for certain advice to have been given. Further, the words 'if, and only if' still appear at the head of the section, so there can be little doubt that these requirements will be applied strictly.

In addition, the relief contemplated by 90UJ(1A) rides on the Court forming the view that “it would be unjust and inequitable if the agreement were not binding on the spouse parties”; it may be that without fully exploring the first three steps²⁴ of a normal s79 property settlement application, the Court will be reluctant to come to a final view on the injustice and inequity of the failure of a financial agreement that does not comply with s90G(1). If that step becomes necessary, is there really anything to be gained from having a BFA in the first place?

The current position

In summary, the following requirements must be met by Part VIIIAB financial agreements and termination agreements entered into after 4 January 2010:

1. the agreement must be in writing;
2. the agreement should not fall foul of the prohibitions contained in s 90UM;
3. the parties to the relationship must not be spouse parties to other Part VIIIAB financial agreements;
4. the agreement must be expressed to be made under the relevant section of Part VIIIAB (that is, the appropriate section from ss90UB-UD);
5. the agreement must not have been set aside by a Court;
6. the parties must not have subsequently married; and
7. separation declarations must be made in order to give force to provisions relating to ‘all or any of the property or financial resources of either or both of the spouse parties’ that take effect after the breakdown of the relevant relationship (s 90UF).

Further, for such agreements to be binding:

1. each party must have received independent legal advice about:
 - a. the effect of the agreement on the rights of that party; and
 - b. the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
2. each party’s legal practitioner must have signed a statement to the effect that the party has been provided with independent legal advice about the specified matters, **and** a copy of that statement must have been provided to the other party or the other party’s legal practitioner **although** that statement need not have been attached to the agreement **and** the statement may have been provided either before or after the agreement was signed.

²⁴ For the Court’s preferred approach to a s79 application see, eg, *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395.

Finally, even if the s90UJ(1)(b), (c) and (ca) requirements are not met, the agreement may still be binding if:

- a. a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and
- b. the court makes an appropriate order declaring that the agreement is binding on the parties to the agreement; and
- c. the agreement has not been terminated and has not been set aside by a court.

In the teeth of the above complexities, it should also be born in mind that even if an agreement does not amount to a financial agreement (binding or otherwise) under the FLA, it may still amount to a contract at common law or equity and may still therefore have consequences for the parties entering it.

The termination of financial agreements.

According to s 90UL, other than by marriage, de facto financial agreements may only be terminated in one of the following two ways:

1. including a provision to that effect in another Part VIIIAB financial agreement; or
2. making a written agreement (a 'Part VIIIAB termination agreement').

In relation to the first option, the same requirements that apply to all other BFAs apply to BFAs that include a provision terminating an earlier BFA.

In relation to the second option, s 90UL(2) and following mirror the requirements of s90UJ(1) and following in relation to the provision of independent legal advice and so on.

Conclusion

On the face of it, BFAs do provide a means for parties to arrange their financial affairs without the Family Court's supervision or intervention. The *Federal Justice System Amendment (Efficiency Measures) Act 2009* has in some ways made the task of formal compliance easier, but in other respects muddied the waters. By the same token, the Full Court decision in *Kostres & Kostres* makes it clear that even in the teeth of formal compliance with the terms of the FLA, the Full Court takes an approach to contractual construction that seems narrower and more pedantic than that which applies in other civil courts.

At bottom, there are two significant issues that must be considered by any practitioner advising a client on the desirability of entering into one of these agreements:

1. the formal requirements for BFAs are technical, complex and potentially confusing, notwithstanding the recent amendments; and

2. there is now an unquantifiable risk that an agreement that otherwise complies with the requirements set out in Parts VIIIA or VIIIAB (as appropriate) of the FLA may be set aside for uncertainty if there is a dispute about the correct construction of the agreement.

It seems clear that BFAs present the practitioner with intimidating professional liability issues. The watchword and countersign here must surely be: proceed with extreme caution, if at all.

Case Note: Kostres & Kostres [2009] FLC ¶93-420

This case was an appeal against orders made by Federal Magistrate Wilson on 17 October 2008. The Full Court (Bryant CJ, Boland & Jordan JJ) delivered its judgment on 15 December 2009.

According to paragraphs 1 – 3 of the judgment:

1. Two days before their marriage in January 2002 Mr Kostres and Ms Kostres executed a financial agreement in order to regulate their financial affairs during their marriage, and to govern such affairs in the event the marriage did 'not work out'.
2. This appeal by the husband, and cross-appeal by the wife, raise for determination how terms of a financial agreement made under Part VIIIA of the Family Law Act 1975 (Cth) ('the Act') should be construed, and the circumstances which may lead to such an agreement not being enforced.
3. It was not in dispute at the time the parties entered into the financial agreement they both mistakenly thought the husband was a bankrupt. But they did not reveal this fact to the solicitors who drafted and gave advice about the financial agreement. The parties' mistaken belief about the husband's status led to them acquiring assets which were not purchased in the parties' joint names.

Notwithstanding the common mistake, the validity of the agreement was not in dispute by the parties; the primary disagreement was around its proper construction. In submissions both before the Federal Magistrate at first instance and then before the Full Court the parties contended for different interpretations of a number of words and phrases appearing in the agreement, notably 'acquired', 'assets', 'joint funds' and 'from their own moneys'. It became necessary, then, for the Court to consider the appropriate construction of the agreement pursuant to s90KA.

In discussing the principles of contract law to be applied to the construction of the agreement, the Full Court referred to the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, with particular emphasis being placed on the High Court's affirmation of 'the principle of objectivity by which the rights and liabilities of the parties to a contract are determined'²⁵. It appears from the judgment that the references to this case were derived from a secondary source, namely 'the learned authors of Cheshire and Fifoot's Law of Contract (9th edition)²⁶'.

According to the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, the 'principle of objectivity' amounts to the following:

[i]t is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a

²⁵ (2004) 219 CLR 165 at para 40.

²⁶ [2009] FLC ¶93-420 at para 113

contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221)²⁷.

Significantly, the first two sentences of the above passage were not extracted by the Full Court in the *Kostres and Kostres* judgment; given that the source quoted by their Honours was a textbook, they may not have been aware of those sentences.

The above extracted discussion in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* was prompted by a factual situation in which a company officer who signed a document had not read the conditions on the reverse of the signed page:

Mr Gardiner-Garden signed a document which invited him to read the terms and conditions on the reverse before signing. He was not rushed or tricked into signing the document. He chose to sign it without reading it. He could have read it had he wished. Finemores did not set out to conceal from him the terms and conditions on the document, or to encourage him not to read them. Finemores had no way of knowing that he did not read the document. No case of mistake or *non est factum* is advanced²⁸.

The High Court proceeded to refer to a number of authorities before concluding that they all accorded with the well-known principle stated by Scrutton LJ in *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 at 403 ('*L'Estrange v Graucob*') that '[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.'²⁹

It seems clear, therefore, that when the High Court was referring to 'objectivity' as a technique of construction it was *not* referring to what the respective parties *actually* had in mind, since in the *L'Estrange v Graucob* lineage of cases it was immaterial that the party seeking to avoid the contract had not even read the conditions.

*Pacific Carriers Ltd v BNP Paribas*³⁰ clarifies this further:

What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing. The letters of indemnity were, and were intended by NEAT and BNP to be, furnished to Pacific. Pacific did not know what was going on in Ms Dhiri's mind, or what she might have communicated to NEAT as to her understanding or intention. The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific³¹. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have

²⁷ (2004) 219 CLR 165 at para 40.

²⁸ (2004) 219 CLR 165 at para 39.

²⁹ (2004) 219 CLR 165 at para 46.

³⁰ (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221.

³¹ *Wilson v Anderson* (2002) 76 ALJR 1306 at 1308-1309 [7]-[10]; 190 ALR 313 at 316-317.

understood them to mean³². That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction³³.

The Full Court in *Kostres and Kostres* noted with evident displeasure that it had not been directed to any authorities on the interpretation of contractual terms³⁴. Had the Full Court been directed in submissions to the above High Court cases as *primary texts*, it is unlikely that the following critical phrases employed by the High Court would have been overlooked by the Full Court:

What is important is not Ms Dhiri's subjective intention, or even what she might have conveyed, or attempted to convey, to NEAT about her understanding of what she was doing³⁵.

It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations³⁶.

Instead, the Full Court proceeded with the task of construction by substituting and augmenting what it saw as unclear wording with wording contended for by both parties in submissions. This process proceeded as follows:

120. Clause 6 of the agreement provides as follows:

'[Ms Kostres] and [Mr Kostres] agree that in the event that the marriage should end that the assets of each of them either alone or jointly shall be dealt with as follows:

....

(c) Any assets of whatsoever kind or nature acquired during the relationship from joint funds shall be divided equally between [Ms Kostres] and [Mr Kostres].

(d) Any assets acquired by either party from their own moneys shall remain the property of that person.'

121. The interpretation for which both parties contend (albeit with differing effect) would require the agreement to be read as follows:

'[Ms Kostres] and [Mr Kostres] agree that in the event that the marriage should end that **any interest, either legal or equitable, in property held by or on behalf of either of them (including any interest held personally, or in a company, trust or in any other entity)** either alone or jointly shall be dealt with as follows:

(c) any **financial contribution to the purchase price of any interest, either legal or equitable, in property held by them or on behalf of them (including any interest held personally in a company, on trust or in any other entity on their behalf) made** during the relationship from **funds derived from**

³² *Gissing v Gissing* [1971] AC 886 at 906; *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 441 at 502; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

³³ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; [1998] 1 All ER 98.

³⁴ (2009) FLC ¶93-420 at para 108.

³⁵ *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at 1050-1051 [22]; 208 ALR 213 at 221.

³⁶ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at para 40.

their joint endeavours, [or in the case of the wife from jointly held funds] although not necessarily contributed equally, shall be divided equally between [Ms Kostres] and [Mr Kostres];

(d) any **financial contribution to the purchase price of any interest, either legal or equitable, in property held personally, or by or on behalf of either party in a company, trust or any other entity by or on behalf of one party exclusively** from their own moneys **or borrowings** shall remain the property of that person.' (our emphasis)³⁷

It is surprising that in an exercise that was directed toward the objective ascertainment of what a reasonable person would have understood the relevant words to mean at the time the agreement was made, the Full Court actually embarked on a process that simply combined the submissions of the parties' lawyers before the Courts years after the agreement was made. The parties' submissions may have been relevant to the Court in its deliberations aimed at discovering the notional reasonable person's understanding, but it seems contrary to authority to combine those (unsurprisingly subjective and tendentious) submissions and suggest that the resulting mish-mash demonstrates that the contractual terms were incapable of being ascertained with certainty.

If this were the correct approach, one would expect that in all proceedings where the parties contend for different contractual constructions, courts would by virtue of that fact alone find fatal uncertainty in the terms. In fact, the correct approach seems to be somewhat different to that employed by the Full Court. In *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd*³⁸ Barwick CJ noted that

a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. **As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application** [emphasis added]. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connexion in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, at p 512 ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G) & Nephew Ltd v Ouston* (1941) AC 251 is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved³⁹.

The Full Court's conclusion on the issue is as follows:

³⁷ [2009] FLC ¶93-420 at paras 120-121.

³⁸ [1968] HCA 8; (1968) 118 CLR 429; (1968) 41 ALJR 348

³⁹ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8 at paragraph 9.

129. While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. This is particularly so when regard is had to provisions of Part VIII A in the overall context of the Act.
130. The differing arguments of the legal representatives in this case as to how the terms 'acquired', 'assets', 'joint funds' and 'from their own moneys' should be construed brings into sharp focus the ambiguities in those terms found in the drafting of clause 6 of the agreement.
131. We think it is particularly relevant that this agreement, which the parties entered into with the intention of dealing with their property and financial resources during their marriage and if it broke down, did not reflect the terms of the section (s 79) which it sought to bypass. Clause 6 does not refer to 'contributions', either financial or non-financial, nor does it, except in clause 6(d), refer to 'property' or 'financial resources'. These terms are ones which are well known and the subject of a considerable body of case law as to their interpretation.
132. We are satisfied that the construction each party asserts should be given to the terms of clauses 6(c) and (d) goes beyond that which can be objectively construed or implied to give effect to the parties' intentions at the time the agreement was made. This is readily apparent from our re-construction of the agreement inserting the words which the parties' respective legal representatives assert must be read into clause 6 to give efficacy to it. The differing interpretation of the expressions 'joint funds' and 'from their own moneys' starkly illustrates our concern.
133. It is clear to us that the terms of the agreement are ineffective, particularly insofar as it is asserted they deal with the right to seek division of the business, the trust and the two units. It follows from that conclusion that the Federal Magistrate's decision to enforce the terms of the agreement as he did constitutes appealable error⁴⁰.

While the Full Court noted at paragraph 129 in the above extract that 'it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned,' the conclusion that this was the case in the *Kostres* agreement appeared to have been based on an analysis of the parties' rival submissions, rather than on the Court's own independent analysis, which was what the High Court laid down as the correct approach in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd*. Accordingly, the Full Court appears to have conflated 'uncertainty of meaning' and 'absence of meaning or of intention'⁴¹.

With great respect, the Full Court in *Kostres and Kostres* demonstrated a surprising willingness to limit its own ability to construe the terms of the agreement by placing what appears to have been an over-emphasis on the parties' dispute over those terms. This is further illustrated by its preference for the words 'contributions', 'property' and 'financial resources' over the words 'acquired', 'assets', 'joint

⁴⁰ *Kostres & Kostres* [2009] FLC ¶93-420 at paras 129-133.

⁴¹ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* [1968] HCA 8 at paragraph 9.

funds' and 'from their own moneys'⁴². It is novel to suggest that words in ordinary English usage that have not been the subject of intense judicial scrutiny in the family jurisdiction are somehow incapable of being given clear meaning. After all, section 71A (and the de facto mirror provision s90SA) simply provides that a BFA displaces jurisdiction under Part VIII, and the formal requirements for a BFA nowhere include a requirement that the language of s79 and its de facto equivalent be mirrored in the agreement.

The consequences of this decision for BFAs are dire indeed. Not only is the wording used in the *Kostres and Kostres* agreement relatively common coinage in the precedents used by the legal profession, but it seems clear that if in subsequent Family Court litigation one party contends for a construction of contractual terms that radically differs from that suggested by the other, this disagreement might cast a shadow backwards in time to the making of the agreement and retrospectively generate fatal uncertainty.

For parties seeking to set aside BFAs there now seems to be a relatively simple and foolproof forensic tool available to ensure success: whatever construction the other party is contending for, contend for its opposite!

⁴² *Kostres & Kostres* [2009] FLC ¶93-420 at para 131.